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No. 499

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IN THE

Supreme Court of the United States

October Term, 1943.

PATRICIA R. O'BRIEN, *Petitioner,*

vs.

EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN, MARIE O'BRIEN MICHAEL, EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN, AND RICHARD J. WHELAN, EXECUTORS UNDER THE WILL OF ELIZABETH GRAVES O'BRIEN, DECEASED; THE FIDELITY & COLUMBIA TRUST CO. AND THE LOUISVILLE TRUST COMPANY, CO-ADMINISTRATORS OF THE WILL ANNEXED OF JOHN A. O'BRIEN, DECEASED; AND EDWARD J. O'BRIEN & CO., A CO-PARTNERSHIP COMPOSED OF EDWIN J. O'BRIEN, JR., JAMES G. O'BRIEN, JOSEPH B. O'BRIEN; AND EDWIN J. O'BRIEN, JR., JOSEPH B. O'BRIEN AND RICHARD J. WHELAN, EXECUTORS UNDER THE WILL OF ELIZABETH GRAVES O'BRIEN, DECEASED, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY AND SUPPORTING BRIEF.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	2
Summary and Short Statement of the Matter Involved	2
Statement of Basis of Jurisdiction	16
Questions Presented	19
Reasons Relied on for Allowance of Writ	20
Brief in Support of Petition for Writ of Certiorari.	
I. Factual Background	25
II. Argument	39
Conclusion	41

TABLE OF AUTHORITIES.

Statutes Cited—Kentucky Civil Code of Practice.

PAGE

Carroll's Kentucky Civil Code, Sec. 528..... 39

Carroll's Kentucky Civil Code, Sec. 737..... 40

B. & O. R. R. Co. v. U. S., 298 U. S. 349, 80 L. Ed. 209, 56 S. Ct. 797..... 39

Brinkerhof—Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451..... 39

Edwards-Barnard Co. v. Pflanz, 115 Ky. 393, at p. 403, 73 S. W. 1018..... 40

Georgia Railway & Electric Co. v. Decatur, 295 U. S. 165, 55 S. Ct. 701, 79 L. Ed. 1365..... 39

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265 39

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 S. L. R. 406..... 39

Petroleum Exploration v. Public Service Commission, 304 U. S. 209, 82 L. Ed. 1294, 58 S. Ct. 834. 38

Railroad Commission v. Pacific Gas & Electric Co., 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334..... 39

Saunders v. Shaw, 244 U. S. 317, 64 L. Ed. 1163, 37 S. Ct. 638..... 41

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124 41

Washington Ex. Rel. Oregon Railroad Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.. 41

Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. Ed. 914 39

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY AND SUPPORTING BRIEF.

To the Supreme Court of the United States, and to the Honorable Chief Justice and Associate Justices Thereof:

The petitioner, Patricia R. O'Brien, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Kentucky entered in the above styled cause and respectfully shows the Court:

Summary and Short Statement of the Matter Involved.

The petitioner seeks to have this Honorable Court review the judgment of the Court of Appeals of Kentucky as expressed in the opinion of the Court reported in 294 Ky. 793, 172 S. W. 2d 595. This is the final opinion in the case by the Court of Appeals of Kentucky. It is the opinion "as modified and extended on denial of rehearing March 26, 1943, as extended on denial of further rehearing June 25, 1943." The Court of Appeals of Kentucky rendered three opinions in this case, all three of which are contained in the record herein.

This action was instituted in the Circuit Court of Jefferson County, Kentucky, by Mrs. Patricia R. O'Brien, sole beneficiary of the will of her late husband, John A. O'Brien to rescind an executed contract of sale of his interest in the partnership of Edward J. O'Brien & Company, upon the ground of fraud and deceit. It is prosecuted against his former partners, who are his brothers, and the executors of the will of his mother who had also been his partner. The administrators with the will annexed of John A. O'Brien, who declined to bring the suit, are also parties defendant. The case involves much more than a simple bargain and sale (Court of Appeals of Kentucky opinion, p. 2). The Chancellor denied the plaintiff's prayer for relief and she appealed to the Court of Appeals of Kentucky, which affirmed the judgment.

Three of the six members of the Court of Appeals of Kentucky considering the case were of the opinion that the plaintiff was entitled to a rescission of the sale or to an adjustment of the equities on, four items: (1) profits of the company for 1935, amounting to $17,185.07; (2) increase during that year in the value of stocks and bonds owned by the company, $22,262.05; (3) excess of appraised

over book value of the property, plants and equipment of subsidiary companies, $8,890.51; and (4) interest due from Edwin J. O'Brien, Jr., upon a deficiency in a proper proportion of the capital and a large overdraft, resulting in the company having to borrow money which it would otherwise not have had to do, $36,477.70.

A petition for rehearing on the extended opinion was filed, as a result of which the opinion of the Court of Appeals was further extended on June 25, 1943, at which time the said Court denied petitioner's claim that in these proceedings she had been deprived of due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

The litigation grew out of the sale by Patricia R. O'Brien of the partnership interest of her deceased husband to James G. O'Brien, a brother of the deceased, under unusual circumstances.

The contract sought to be rescinded "was between strong business men of large influence on the one side, and a widow, inexperienced in business and finance, on the other," according to the findings and opinion of the Court of Appeals of Kentucky (Opinion, p. 2). The business of the partnership is "probably the largest of its kind" (Opinion, p. 2). "It is that of loose leaf tobacco brokers and wholesale merchants, with its principal office in Louisville. It has branches in other states and connections and transactions abroad" (Opinion, p. 2). "In addition to large investment in the physical properties of the firm and those of its wholly owned subsidiaries, and seasonably in tobacco, the company held title to stocks and bonds averaging through the course of later years around $1,000,000 in value. It appears that some of the personal affairs of each partner was handled by the company's bookkeeping staff or was cleared through his account."

The firm consisted of the following, with their respective capital interests, namely: the mother, Mrs. Elizabeth G. O'Brien, fifteen per cent, and each of the four sons, Edwin J. O'Brien, Jr., Joseph B. O'Brien, James G. O'Brien, and John A. O'Brien, 21¼% (Opinion, p. 2).

Edwin J. O'Brien, Jr., was the manager of the business. John A. O'Brien was the youngest son. He was taken into the partnership in 1919 with a full 12% interest in the company (Tr., Vol. 12, p. 1070, q. 9), and after learning the business under the apprenticeship of his father, became a tobacco buyer in 1922 (Tr., Vol. 12, p. 1133, q. 10). As such he was engaged in buying tobacco for the firm's account at various places, including Georgia, North Carolina, South Carolina, Tennessee, and Kentucky (Tr., Vol. 12, p. 1133, q. 10). For nearly ten years John was in charge of all buyers of Edward J. O'Brien & Co. (Tr., Vol. 2, p. 111, q. 10; Vol. 12, p. 1113, q. 248). During this time, on September 27, 1925, John was married to Patricia R. O'Brien and they lived together until his death, January 1, 1934 (Tr., Vol. 2, p. 110, qs. 3-5).

Article 5 of the partnership agreement provided: "The death of any partner hereto shall not terminate the partnership." Article VI: "In the event of the death of any partner his or her interest shall remain in said partnership until Five (5) years after such occurs," (Court of Appeals opinion, p. 4). In the meantime a deceased partner's interest "shall be a silent partner only and shall not be entitled to participate in the management and the personal representative shall accept statements rendered by the partnership as final and conclusive" (Article 6, Court of Appeals opinion, p. 4). Article 6 reads: "In the event the estate elects to withdraw from the partnership at the expiration of Five (5) years, then the interest of said decedent shall be the value of the interest, as shown by the books of the company, or by appraisement, plus profits and interest if any" (Same opinion, p. 4, and Exhibit 24).

"It is necessary to refer to some apparently shameful occurrences for an understanding of conditions and negotiations for the purchase and sale of the estate's interest" (Court of Appeals opinion, p. 4). "For some time there had been an estrangement between John and his brothers, especially Edwin and Joseph" (Opinion, p. 4).

According to a friend, "he had not spoken to his two brothers since their father's death in 1928" (Opinion, pp. 4-5). John became ill in 1933. He went to the firm's office for the last time in April, 1933 for a day or so but he did not continue because of the attitude and mistreatment of his brother, Edwin (Opinion, p. 5). On the afternoon of June 20, 1933, while his wife was absent for a half hour or so, John disappeared from home. Mrs. O'Brien and her attorney, Leo T. Wolford, went to the company's office that afternoon to inquire about her husband and Edwin refused to tell them anything. Mrs. O'Brien located him at the home of his brother Joseph. She and two friends went there the next morning but were denied admittance, being told by both Mr. and Mrs. Joseph B. O'Brien that he "was too ill to see anyone" (Opinion, p. 5). "They had the same experience on a later visit. On both occasions there were four khaki-clad armed men in the hall and on the outside. Mrs. O'Brien tried repeatedly to see her husband or talk with him over the telephone but she did not succeed" (Opinion, p. 5).

"On August 3 she found him in the Seelbach Hotel in a dying condition" (Court of Appeals opinion modified and extended March 26, 1943). His doctor testified that "He had not expected him to live through the night" (Opinion, p. 5). There is no intimation of any other than an affectionate relation between John and his wife (Opinion, pp. 5 and 6).

Sometime during this period of incarceration, apparently July 7, 1933, "John executed a trust agreement with

the Louisville Trust Company as trustee, undertaking to dispose of the proceeds of $200,000.00 life insurance. It omitted his wife, who was named in the policies as either sole beneficiary or an annuitant during her life. These policies, or most of them, had been acquired in 1929, within less than three years of his marriage. The trust was for the benefit of any child or children, but if none lived to be 25 years of age or had died without descendants the entire trust estate was payable 'in equal shares to such of the blood relatives of the assured as shall then be partners in the firm of Edward J. O'Brien & Company.' On the same day John A. O'Brien executed a will bequeathing to his wife his automobile, household goods, and one-half of his personal estate, 'including one-half of my interest in the partnership of E. J. O'Brien & Company.' The disposition of the remainder was the same as that provided for in the trust agreement. The will made special reference to the terms of Article 6 of the partnership agreement and provided that the Trust Company, as trustee under the will, should receive testator's share of the profits during the five-year period.

"The execution of these papers is surrounded by mystery. George D. Caldwell, Vice President and Trust Officer of the Louisville Trust Company, testified that in the afternoon of July 7 he was called by Joseph Laurent, attorney, since deceased, and told he was sending John A. O'Brien to see him. When he arrived he had already executed the will, with Laurent and L. M. Disselkamp as witnesses. He asked Caldwell to examine the trust agreement and then it was signed by O'Brien and by Caldwell, on behalf of the Louisville Trust Company as trustee. Their signatures were witnessed by two persons. Caldwell took O'Brien to the Vault department and introduced him to the superintendent. He obtained a safety box and deposited the two instruments there. None of the three liv-

ing witnesses to these documents or the vault superintendent testified. Caldwell did not refer to John A. O'Brien's mental or physical condition. It does not appear that Laurent had ever been O'Brien's attorney. He had had a safety box jointly with his wife at another bank for several years. The trust agreement recited that O'Brien had caused six listed insurance policies to be deposited with the Trust Company. As a matter of fact they were never deposited. A significant thing is that the instrument listed a policy for $30,000 which had been cancelled and re-issued as two policies, with different numbers, for $20,000 and $10,000, respectively. The record shows that John A. O'Brien's insurance premiums had been paid by the company and charged to his account, so it is a reasonable inference that the records of the firm still showed the original policy numbers and amounts. The policies themselves were at his home. Another thing of significance is the probability that John A. O'Brien would not leave any child surviving him, so that the trust and will both were for the benefit of his brothers, the widow receiving from his estate substantially only what she would be entitled to under the law upon renunciation of any will" (Opinion, pp. 6-7).

"Several weeks later John A. O'Brien set about diligently to undo what had been done and to revoke the trust. Without detailing the telephone conversations between Mr. Caldwell and Mrs. O'Brien, or certain letters of the two men, it seems sufficient to say that O'Brien revoked the trust and Caldwell returned to him the executed copy which the company had retained. O'Brien also notified at least some of the insurance companies that any trust he had undertaken to make had been revoked, and in December executed forms irrevocably designating his wife as sole beneficiary, with the exception of one policy. The one not so changed was for $50,000 and provided, in accordance with one of its options, for the payment of the

proceeds to the widow in monthly installments and if any part remained in the hands of the company at her death the balance to the insured's children, but if none to his mother, sister and brothers. In view of his actions with respect to the whole matter, we are persuaded this policy was overlooked" (Opinion, pp. 7-8).

John A. O'Brien executed a will bearing date of September 22, 1933 (although apparently acknowledged before the witnesses in October) as follows: "I give to my wife, Patricia R. O'Brien, all of the household furniture and all of the personal property of my estate."

The tension between the parties was made more acute when Mrs. Patricia O'Brien ordered James O'Brien from her home in November and refused to let him see John, who was ill. A friend testified that John had said he did not want any of his brothers to come there.

This was the situation when John A. O'Brien died, January 1, 1934.

"When Mrs. O'Brien and her attorney presented the will of September 22d for probate, they learned that Thomas A. Barker, who had been the attorney for E. J. O'Brien and Company for many years, had requested an officer of the Court to notify him if any will should be presented since he had 'a later will.' It was disclosed at the probate proceeding that John O'Brien had a safety box with the Louisville Trust Company.

"The opening of the box revealed the will of July 7, 1933 (Ex. 16), which was offered for probate by the Louisville Trust Company, named as executor. It was probated with the will of September 22d as a codicil (Ex. 17). Mrs. O'Brien nominated the Fidelity & Columbia Trust Company as administrator with the will annexed, and the Louisville Trust Company asked that it be appointed. Both were named as co-administrators (Ex. 18).

"O'Brien's copy of the insurance trust was also in the box. Passing the disputed testimony as to the acts and statements of Barker at the time, it is pretty well established that Caldwell stated that the trust had been revoked, and that Barker questioned its revocation. Mr. Barker admits advising the Trust Company that he did not consider the trust legally revoked and he would insist on its being executed. Thereupon Mr. Caldwell notified the several insurance companies of the existence of the trust and that a claim to the proceeds of the policies would be made under it. However, one company paid Mrs. O'Brien $50,000 before it received this notice. This action had the effect of holding up payment of $150,000 proceeds of the other policies to Mrs. O'Brien as beneficiary. It was not until May, 1935, about 14 months later, that definite steps were taken toward suing to recover the insurance proceeds. Suggestions were then made (by whom in the first instance is not clear) that there could be no settlement of that issue without a settlement of the estate's interest in the partnership. Mrs. O'Brien was insisting that she did not want to dispose of that interest and that the insurance matter should be handled separately, while representatives of the O'Brien brothers were insisting upon joint consideration. Her attorneys seem to have been of the opinion that the propositions must be considered together. In the beginning, representatives of the brothers, and perhaps of the Louisville Trust Company, were suggesting if not threatening a contest of the will of September 22d, and also contending that it should be construed as devising the widow only the household furniture and other personal effects of like character, with no interest in the partnership passing under it. All these claims were through or by Barker and Joseph Laurent, who, it appears, was representing the O'Brien brothers as well as the Louisville Trust Company" (Opinion, pp. 9-10).

The foregoing paragraphs have been quoted directly from the Court of Appeals' opinion, particularly because of the sentence therein contained that the Court found the foregoing "a fair statement of the conditions."

The "purchase of the interest, according to the record, was by James G. O'Brien individually, but his brothers, through the attorneys for all three of them, conducted the negotiations and all joined in the contract of settlement" (Opinion, p. 11).

"The petitioner contends that unfair threats and unconscionable pressure were brought to bear upon her, not only in relation to the affairs of the partnership business but in the matter of the insurance trust and her husband's will" (Court of Appeals opinion, p. 13).

"Negotiations for a settlement began in June, 1935, eighteen months after John A. O'Brien's death. There was submitted to Mrs. O'Brien and her attorney a memorandum (referred to in the record as Exhibit 22) showing the 'present interest of the estate to be $425,649.45' " (Court of Appeals opinion, p. 14). Petitioner claimed that Exhibit 22 upon which she relied as the O'Brien partners' representation of the value of her deceased husband's partnership interest, understated such value to the extent of $297,558.39.

PLAINTIFF'S EXHIBIT No. 22.

Present Interest		$425,649.45
Real Estate	$331,873.95	
Pro Rate based on capital....	23.77%	78,886.44
		$346,763.01
Her ⅓ Life Interest Real Estate 23¼% of $78,886.44		18,341.10
		$365,104.11
Depreciate wholly owned subsidiaries 50% $252,500 at 50%—$126,250 at 23.77%		30,009.62
		$335,094.49
Remainder Interest in $50,000 Life Ins....		17,500.00
		$317,594.49
½		$158,797.25

The petitioner was told that her interest in the partnership would be settled for $158,797.25. This was what the O'Brien brothers offered her through their lawyer, Tom Barker. This figure was arrived at as follows:

$425,649.45 was supposed to be the market value of John A. O'Brien's interest in the partnership at the time of his death, but the partnership assets included real estate of $331,873.95, The figure of 23.77% was taken as John A. O'Brien's share of the partnership. The O'Brien brothers claimed that under the will she was not entitled to any of the real estate and therefore his share of the real estate should be deducted, to wit, $78,886.44, leaving $346,-763.01. She was given credit for dower of one-third life interest which approximated 23.25% of $78,886.44 or $18,341.10, raising her interest to $365,104.11; however, this figure would include the subsidiaries as full book value whereas it was claimed by the O'Brien brothers that these subsidiaries were worth only 50% of the book value. Since

the book value was $252,500, 50% of that, the depreciated value would be $126,250 and 23.77% would amount to $30,009.62 to be deducted from $365,104.11, or $335,094.49. It was claimed that Patricia O'Brien was to receive a full $50,000 in cash on one of the life insurance policies which carried a contractual obligation in favor eventually of her brothers-in-law, mother-in-law and sister-in-law, and that remainder interest of $17,500.00 deducted from the $335,-094.49, gave her $317,594.49. As a flat figure they offered her $158,797.25, or one-half of the above amount.

The O'Briens were adamant in refusing to settle the matter piecemeal. Moreover, they threatened through Tom Barker that if she did not sell her interest for the figure of $158,797.25, they would incorporate and freeze out her husband's interest so it would not be worth $100,-000. Other claims were made attempting to coerce the settlement through a sale by her of the partnership interest. Suit was threatened on the insurance trust. They threatened a suit to construe the last will as giving her only personal effects. She was finally offered $350,000 (Tr., Vol. 2, pp. 227, 267, 271, 272; Vol. 6, pp. 669, 670, 671).

Mrs. O'Brien expressed a desire to have an audit made. Mr. Barker, counsel for the O'Brien brothers, replied that the O'Briens would not allow it. She never was permitted to have access to the original books of the partnership but she was provided with audits for 1933 and 1934. The 1928 to 1933 audits were delivered one day and returned in the afternoon to O'Briens' counsel on demand.

The attorneys for the O'Brien brothers who presented Exhibit 22 to Mrs. O'Brien stated that the figure $425,-649.45 was the market value of the interest of John A. O'Brien in the Edward J. O'Brien & Company (Tr., Vol. 2, p. 208, q. 191, p. 213; Vol. 6, p. 670, qs. 61 and 64, plaintiff's Exhibit 22).

This figure did not represent the value, market or otherwise, of the interest of John A. O'Brien in the Edward J. O'Brien & Company and this fact was known to the brothers O'Brien. The details of the fraud inherent in this document will be discussed in sufficient length with appropriate references to the record at pertinent and proper places *infra.*

After considerable negotiation and delay Patricia R. O'Brien finally sold her husband's interest in the partnership to the brothers O'Brien on the basis of the value of John's interest as shown by this fraudulent document, plaintiff's Exhibit 22, and being coerced into so doing by threats from the brothers O'Brien, based principally on the insurance trust agreement and the will obtained from John A. O'Brien while he was held at the home of Joseph under armed guard. The price finally paid for the interest of John A. O'Brien was $380,000 (Exhibit 28).

Thereafter upon learning of the fraud which had been perpetrated against her, Patricia R. O'Brien brought the action referred to. Obviously in order to prove one of the necessary elements of fraud and deceit it was necessary for Patricia R. O'Brien to prove the actual value of John's interest in the partnership at the time of the sale and at the time the representations were made to her. Equally obvious is the fact that in order to do this the books and records of the company intending to establish these values should have been available to Patricia R. O'Brien for the purposes of evidence.

Prior to the taking of the testimony, Mrs. O'Brien applied for a subpoena *duces tecum* to the Circuit Court. This called for the production of many books and records of Edward J. O'Brien & Company and its four subsidiaries for the period from November 1, 1928, to December 31, 1938.

"Motion for Subpoena Duces Tecum.

"Plaintiff, Patricia R. O'Brien, moves the Court to direct the issuance of a subpoena *duces tecum* summoning defendant, Edwin J. O'Brien, Jr., to attend and appear before the Court on March 1, 1940, at 10:00 A. M. and to bring with him then and there certain books, records and papers of original entry, hereinafter specifically named, or their equivalents if called by any other names, of defendant, Edward J. O'Brien and Company, and its four subsidiaries, Tobacco Rehandling Company, Ltd., Inc., H. N. Martin Leaf Tobacco Company, Western Tobacco Company, and Standard Storage Company, covering the period from November 1, 1928, until December 31, 1938.

"1. General Ledger.
2. Journal Record.
3. Private Ledger.
4. Accounts receivable Ledger.
5. Accounts payable Ledger.
6. Check Register.
7. Voucher Register and Vouchers.
8. Purchase Journals.
9. Sales Journals.
10. Investment Records.
11. Expense analysis Records.
12. Copies of Federal and State Tax Return.
13. Inventory Records.
14. Inventory Reports filed with the United States Government.
16. Contracts involving the sale of tobacco in force and effect November 5-15, 1935, and February 11, 1936.
17. Plant and Equipment Record.
18. Partner's Personal Account Books or Records.
19. Correspondence in connection with any summary item in the audit.

"This motion is based upon the record of this action, and the affidavit of Hugh A. White filed herewith" (R., Vol. 3, pp. 259-261).

This motion was supported by an affidavit of Hugh A. White, senior member of the firm of White, Bower and Prevo, a certified public accountant employed by Patricia R. O'Brien to review certain photostat copies purporting to be audits of Edward J. O'Brien and Company for the years 1931 to 1935, inclusive, and its subsidiaries. In the affidavit Mr. White set forth the necessities for obtaining these documents (R., Vol 3, pp. 261-272).

The Court, however, overruled this motion with the exception of tobacco inventories for 1935, including Government reports, capital, drawing and personal account of John A. O'Brien from 1925 to 1935, income tax returns for the years 1931 to 1935, inclusive, insurance premiums paid on any type of insurance by the firm from 1931 to 1935, and any appraisals for 1936, 1937, and 1938 (Record, Vol. 3, p. 273). An effort was made to see the "tobacco inventories for the year 1935 respecting the amount of tobacco." Mr. White was unable to obtain such information from either Edwin O'Brien, Jr., or Edward J. O'Brien and Company. "Likewise Edwin J. O'Brien, Jr., denied him access to the original or detailed records of the inventory which show in detail the type, group, quality, color, lengths and specifications of the tobacco inventory. All of this information was absolutely necessary to determine the market value of the inventory. Therefore, plaintiff filed a motion for an order directing defendants to comply with the Court's order of February 29, 1940, and to produce these documents (R., Vol. 3, p. 279). The Court overruled this motion (R., Vol. 3, p. 294), which left plaintiff without any means of ascertaining the market value of the tobacco inventory except as an accountant might estimate the same. At the same time, the Court denied another motion of plaintiff (R., Vol. 3, p. 284) for access to the property and depreciation reserve accounts, the maintenance and repair accounts and plans and specifications of building construc-

tion of Edward J. O'Brien & Company and its subsidiaries, sustaining said motion only insofar as access to the physical lands, buildings and fixtures was requested (R., Vol. 3, p. 295)."

To overcome this handicap as to the tobacco inventory plaintiff, on March 20, 1940, filed a third motion requesting access to the books and records of original entry of Edward J. O'Brien & Company and its four subsidiaries, such as show individual sales of tobacco, prices, quantities and gradings involved in each from May 1, 1935, until May 1, 1936, including all invoices for such sales (R., Vol. 3, pp. 299-305). This motion was not only denied, but the Court on its own motion revoked and expunged from its order of February 29, 1940, the language relating to the tobacco inventories for 1935 and the government reports relating thereto (R., Vol. 3, p. 297). Plaintiff was compelled to submit to a trial on the merits of this case without the benefit of a single book of original entry of Edward J. O'Brien & Company, or any of its subsidiaries. In this connection it must be remembered that Patricia O'Brien was the widow of a deceased partner and that the defendants' relationship to her was that of trustees to beneficiary. Further, Patricia O'Brien had never been given access to any original books prior to the purchase of her deceased husband's partnership interest by defendants.

Statement of Basis of Jurisdiction.

The jurisdiction of this Court is invoked and the writ of certiorari herein prayed for is permitted by and under Section 237 (b) of the Judicial Code as amended, Title 28, U. S. C. A., Section 344 (b), and especially that portion thereof which authorizes this Court by writ of certiorari to review final judgments of the highest court of a state

"where any title, right, privilege or immunity is especially set up or claimed by either party under the Constitution * * * of the United States."

In the State Court, the rights of the petitioner under the Fourteenth Amendment to the Constitution of the United States was especially set up in the petition for rehearing, on the extended opinion, before the Court of Appeals of Kentucky in the following language:

"Finally, we wish to add one other matter and upon this respectfully request that the Court specifically pass upon it and that is, the Federal question raised in the lower Court upon her motion and grounds for a new trial and upon her motion for a subpoena *duces tecum*, all of which motions were overruled in the lower Court and to which exceptions were reserved" (R., Vol. 4, pp. 411-418; R., Vol. 3, pp. 259-272).

"We respectfully ask the Court to notice that in the motion and grounds for a new trial in the lower Court, it was specifically pointed out, by way of objection, that the Court erred in admitting incompetent evidence offered by defendant in the Court below and rejecting competent evidence offered by the plaintiff, as well as overruling plaintiff's motion for a subpoena *duces tecum* and discovery filed both before and during the trial, and to which ruling the plaintiff excepted at the time all of which grounds are set out in the plaintiff's motion for a new trial in the Court below. It has been further pointed out that the conduct of the chancellor below was such as to amount to a denial of justice and to the equal protection under the laws of the plaintiff below, as exhibited in frequent contemptuous observations as to the plaintiff and her evidence.

"We call the Court's attention to the exceptions of the plaintiff in the Court below to the Court's conclusions of law, twenty-four in number, all of which were claimed

to be erroneous and seriously prejudicial to the rights of the plaintiff below, and all of which conclusions of law and fact resulted in depriving the plaintiff of her property without due process of law and all of which ruling and conclusions deny the plaintiff below and the appellant in this Court the equal protection of the laws, in violation of Section 1, of the Fourteenth Amendment to the Constitution of the United States. Such rulings of the Court below, together with the rulings of this Court as disclosed in its last opinion, will result in a confiscation of the property of the plaintiff below and a deprivation of one-half of the value, or values, of property to which she was entitled. The appellant now asserts that this is a denial insofar as she is concerned, of the equal protection of the laws of the United States and a violation of the Fourteenth Amendment of the Constitution of the United States as set out above."

"With this fact being pointed out, we ask a re-examination of the grounds for a new trial filed in the lower Court, together with the exceptions made to the conclusions of law in the lower Court, as being in violation of the Fourteenth Amendment of the Constitution of the United States and that the Court, in its final opinion upon this petition for rehearing, shall say whether or not the above provisions of the Constitution of the United States have or have not been violated in these proceedings."

The Federal question thus raised was specifically passed upon by the Court of Appeals of Kentucky adversely to the petitioner (Opinion, pp. 32a and 32b).

Questions Presented.

This brings up the questions presented in this petition which we outline as follows:

1. That the denial by the lower court of the process of that Court by refusing in all material respects petitioner's motion for subpoena *duces tecum* resulting in denial to her of access to any single book of original entry of the partnership, or of its subsidiaries; or original document from which to ascertain or prove value, prevented her, in effect, from having her day in Court and amounted to the denial of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States. Georgia Railway & Electric Co. v. Decatur, 295 U. S. 165, 79 L. Ed. 1365, 55 S. Ct. 701; B. & O. R. R. Co. v. U. S., 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797; Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265; Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. F. R. 406; Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. Ed. 914.

2. That the error of the Jefferson Circuit Court in this suit by a widow, sole beneficiary of her husband's estate, to rescind an executed contract of sale of her deceased husband's interest in a partnership to surviving partners, to permit introduction in evidence of documents (a) insurance trust agreement depriving widow of husband's insurance, and (b) will taking everything except dower from widow, which documents were obtained from husband while kidnapped and held under armed guards at the home of one of the surviving partners deprived widow of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

3. The recognition by the Court of said documents obtained by force, as aforesaid, as a bargaining basis for

sale by the widow of her deceased husband's interest in the partnership deprived her of due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

4. The decision of the State Court being contrary to the admitted and uncontradicted facts and the well-established principles of law amounted to arbitrary deprivation of petitioner's property without due process of law and without a real hearing as contemplated under the Fourteenth Amendment to the Constitution of the United States. Saunders v. Shaw, 244 U. S. 317, 64 L. Ed. 1163, 37 S. Ct. 638; Traus v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124; Washington *Ex Rel.* Oregon Railroad Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.

5. Where the Court found facts substantially correct and recognized correct rule of law applicable thereto, but failed altogether without reason to apply such rule of law to such facts as a result thereof there was unjust enrichment of trustee of expense of *cestui que trust*, such action amounts not simply to error, but there is a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States.

Reasons Relied Upon for Allowance for Writ.

The Fourteenth Amendment of the Constitution of the United States, does not, of course, guarantee to any person that the Courts of the several states in the trial of litigation pending before them will decide all matters of fact or law correctly and free from error, nor is it contended that mere erroneous decisions by a State Court will give jurisdiction to this Court to review by writ of certiorari. On the other hand, although in a State Court notice and the opportunity for a hearing of some sort is provided, if the

conduct of a State Court is such that, in effect, while it goes through the form of a hearing, nevertheless, it amounts to no hearing at all, then due process has not been afforded as guaranteed by the Fourteenth Amendment.

Petitioner relies upon the fact that the conduct of the State Court as set out in the five questions presented, *supra*, had the effect of denying her a real or fair hearing as contemplated by the Fourteenth Amendment.

The denial by the trial Court of petitioner's motion for subpoena *duces tecum* in all material respects prevented the petitioner from proving one of the necessary elements of fraud and deceit. To show the true value of the interest of John A. O'Brien in Edward J. O'Brien & Company and thereby the falsity of respondents' representations was absolutely necessary in order for plaintiff to make out her case. If the Court afforded her its process and gave her a full hearing on all the other elements necessary in order to make out a case of fraud and deceit for the rescission of the contract of sale and yet denied her the process of the Court by subpoena *duces tecum*, or otherwise, and denied her an opportunity to be heard at all upon this one necessary element of her cause of action, then she has, in effect, had no hearing at all.

The petitioner, as the widow and sole beneficiary of her husband's estate, occupied the same position as her husband would have occupied if living with regard to the use as evidence against her of documents procured from her husband by force and while he was being illegally held a prisoner being deprived of his liberty without due process of law. Therefore, the error of the Court in permitting documents obtained from the husband under such circumstances and by force to be used as evidence against him or against a personal representative of his estate and stand-

ing in the same position as would have been occupied by the husband had he been living, constituted such error as to deprive the petitioner of due process of law.

These same documents which were obtained, as aforesaid, were recognized by the Court in its decision as a bargaining basis for the sale and as the consideration for the giving up by the widow of her husband's interest in the partnership for less than it was actually worth.

In this regard, the Opinion of the Court of Appeals relates (Opinion, p. 18):

> "These things (referring to these documents and other inconsequential claims) were factors to be considered when a full revelation of the business and its worth had been made. Their settlement was part of the consideration for the sale of the partnership interest. The difference between its value and the cash payment for it is represented by their surrender."

For the Court to permit documents which were obtained in such a manner thereafter to be used as consideration for the widow giving up her deceased husband's interest in the partnership for less than it was worth is relied upon as depriving her of her property without due process of law.

Uncontradicted facts in this record show that the representations made by the brothers O'Brien to Mrs. O'Brien as to the value of her deceased husband's interest in the partnership of Edward J. O'Brien & Company were fraudulent in that they were false and incomplete and that Mrs. O'Brien and her attorneys and advisors relied upon these representations in contracting for and selling the partnership interest to the brothers O'Brien. The well-established principles of law recognized by the Court, demanded of the brothers O'Brien in dealing with the widow of their deceased brother and partner whose estate still occupied the position of silent partner in the partnership,

the duty represented by the term *uberrima fides*. This duty was violated by them and recognized by the Court to have been so violated. In rendering its decision, however, the Court arbitrarily and without reason failed to apply the law to the facts. This procedure amounted to the denial of any real hearing to the petitioner and deprived her of her property without due process of law. The foregoing are the reasons relied upon by the petitioner for the issuance of the writ of certiorari herein prayed for and it is respectfully submitted that any one of them is sufficient for this purpose. In her brief which is annexed to this petition, petitioner will seek to go more fully into each of these reasons, and petitioner respectfully submits that for the foregoing reasons a new trial in the State Court should be afforded to this petitioner.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of This Honorable Court directed to the Court of Appeals of Kentucky commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings in the case of Patricia R. O'Brien against Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien, Marie O'Brien Michael, Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the Will of Elizabeth Graves O'Brien, Deceased; The Fidelity & Columbia Trust Co. and the Louisville Trust Company, Co-Administrators of the Will Annexed of John A. O'Brien, Deceased; and Edward J. O'Brien & Company, a Co-Partnership Composed of Edwin J. O'Brien, Jr., James G. O'Brien, Joseph B. O'Brien; and Edwin J. O'Brien, Jr., Joseph B. O'Brien and Richard J. Whelan, Executors Under the Will of Elizabeth Graves O'Brien Deceased, and that the judgment of the Court of Appeals of Kentucky and of Jefferson Circuit Court,

Chancery Branch, First Division, be reversed, and that an order be entered remanding said case to the said Court of Appeals of Kentucky and to the said Jefferson Circuit Court, Chancery Branch, First Division, for a new trial thereof and for such other and further relief in the premises as to this Honorable Court may seem meet and just.

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